

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Communications Assistance for Law)	ET Docket No. 04-295
Enforcement Act and Broadband Access)	
and Services)	
)	RM-10865
)	
)	

**REPLY COMMENTS OF
THE UNITED STATES TELECOM ASSOCIATION**

In response to comments filed on the First Report and Order and Further Notice of Proposed Rulemaking¹ (Order and FNPRM) regarding application of the Communications Assistance for Law Enforcement Act (CALEA) to facilities-based broadband Internet access providers, the United States Telecom Association² (USTelecom) raises two concerns. First, because certain statements of the Federal Communications Commission (Commission) could be interpreted to limit the availability of the private network exemption under section 103(b)(2) of CALEA, the Commission should clarify that the ability of a private network to access a public network does not eliminate the private network exemption. Second, the Commission should confirm that it alone shall decide any exemption requests under CALEA, and, while the Commission may consult with the Department of Justice (DOJ)—and should continue to accord

¹ *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, ET Docket No. 04-295 and RM-10865 (rel. Sept. 23, 2005).

² USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data, and video over wireline and wireless networks.

the Attorney General's views "substantial weight" as it has in past proceedings—the Commission should reject the DOJ's request to broadly interpret the consultation role.

DISCUSSION

CALEA does not apply to private networks.

Private networks are not subject to CALEA, and the Commission should not limit CALEA's exemption for private networks. Congress specifically excluded the "equipment, facilities, or services that support the transport or switching of communications for private networks" from CALEA.³ Therefore, the Commission need not carve out specific exemptions for the private networks of educational institutions, or other constituencies; nor should the private network exemption be limited or narrowed now that the Commission has determined that CALEA compliance applies to broadband access services and telephony service that interconnects with the public network. As noted in comments filed by the American Association of Collegiate Registrars and others, while the Commission recognizes that operators of private networks are not subject to CALEA, "it introduced ambiguity by extending CALEA to entities that 'support the connection of the private network to a public network'."⁴ The Commission has not clearly defined what it means by the phrase "support the connection of the private network to a public network."

USTelecom is concerned that certain statements of the Commission could be interpreted to limit the availability of the private network exemption under section 103(b)(2) of CALEA. USTelecom members own and operate private networks to facilitate communication among employees, and they sell private network services to end user customers. These private

³ 47 U.S.C. § 1002(b)(2)

⁴ American Association of Collegiate Registrars *et al.* Comments at 2; *see also* Corporation for Education Network Initiatives *et al.* Comments at 14-15.

networks, whether provisioned for internal corporate communications or sold as a service to an end user, are not accessible by the public. USTelecom believes that the Commission should not require CALEA compliance for a private network that a provider offers and operates as a service for end user customers (*i.e.*, colleges, libraries, government facilities or other corporations), or for the private networks that a provider may operate for its employees to “communicate with one another and/or retrieve information from shared data libraries not available to the public.”⁵ In other words, CALEA should apply only to the public network elements owned and operated by service providers allowed under the statute. CALEA should not apply to any private network, regardless of who owns or operates the provisioned communications services and regardless of how that private network connects with any of several public networks.

Congress did not intend the Attorney General to have a broader role in evaluating CALEA exemption requests.

Section 102(8)(C)(ii) of CALEA permits the Commission—after “consultation” with the Attorney General—to exempt certain carriers from CALEA. DOJ comments that “in the context of CALEA, the Attorney General has unique expertise in the areas of combating crime, protecting homeland security, and conducting electronic surveillance”⁶ and seems to suggest that it should be afforded a more substantial role in deciding whether exemptions from CALEA compliance should be granted, saying “in the case of Section 102(8)(C)(ii) exemptions under CALEA, there are issues to be evaluated which fall largely within the unique expertise of the Attorney General.”⁷

⁵ *Id.*

⁶ DOJ Comments at 15.

⁷ *Id.* at 16.

USTelecom does not believe that a broader role was intended for DOJ with respect to the evaluation of CALEA exemption requests. Had Congress desired such a result, it surely would have made it clear. Presumably, the Attorney General would agree that DOJ does not possess the expertise needed to evaluate the technical compliance aspects of the ever-evolving range of services and capabilities to which CALEA potentially applies. That expertise lies solely with the Commission. Congress has given the Attorney General an important role in evaluating requests for exemption, but that role does not necessitate “consultation” with the Attorney General that is materially broader in scope or breadth than what is understood to be required in other similar contexts.

The Commission identifies the proper role for DOJ in evaluating CALEA exemptions when it suggests applying the same “consultation” standard used in its consideration of section 271 applications.⁸ In that context, the Commission properly observed, “the Attorney General is entitled to evaluate the application ‘using any standard the Attorney General considers appropriate,’ and the Commission is required to ‘give substantial weight to the Attorney General’s evaluation’.”⁹ But, when deciding whether to grant a section 271 application, the Commission “deem[s] the consultation requirement to be satisfied through consideration of the Attorney General’s filed comments on the BOC’s section 271 application.”¹⁰ There is nothing in the present context that warrants changing the careful balance of Commission and DOJ expertise that Congress clearly struck in the language chosen in CALEA statute. Similarly, DOJ is permitted to “consult” with “appropriate industry associations and standard-setting organizations of the telecommunications industry” and others regarding the assistance capability requirements

⁸ Order and FNPRM ¶ 50.

⁹ *Id.* n.149.

¹⁰ *Id.*

of CALEA, but it may not, however, specify any designs, features, or services with regard to CALEA compliance.¹¹ Thus, the DOJ's role in the implementation of CALEA is clearly limited by the statute.

Therefore, USTelecom believes that the Commission should interpret "consultation" for CALEA exemption purposes as it has in the 271 context. The benefit CALEA provides to law enforcement is just one of many factors that the Commission must consider when evaluating an exemption request. And, as DOJ, itself, has recognized, the views of the Attorney General on law enforcement issues should not supplant the Commission's independent judgment on exemption matters,¹² and other factors must be weighed by the Commission. The effect of CALEA on the innovation and development of new technologies, for instance, must be considered because communications providers may be reluctant to develop and deploy innovative services and technologies if requirements for building in CALEA capabilities into equipment are unduly expansive or if it is perceived that that DOJ will have undue influence over the Commission's ability to fashion appropriate CALEA compliance exemptions.¹³ As Congress stated, nothing in CALEA shall limit or dictate the development of and market for new technologies, and the Commission should ensure that Congress' intent is not thwarted by handing DOJ veto power over CALEA exemption petitions.¹⁴

¹¹ See 47 U.S.C. §§ 1002(b)(1) and 1006(a)(1).

¹² DOJ Comments at 18.

¹³ See *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, Notice of Proposed Rulemaking and Declaratory Ruling, ET Docket No. 04-295 and RM-10865 (rel. Aug. 9, 2004) ¶ 61.

¹⁴ House Rep. at 3489; see also *id.* at 3493-94.

CONCLUSION

For the reasons above, USTelecom urges the Commission to make clear that CALEA does not apply to private networks and that the role of the Attorney General should not be expanded.

Respectfully submitted,

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